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Nos. 99-5 and 99-29

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

ANTONIO J. MORRISON, ET AL.

CHRISTY BRZONKALA, PETITIONER

v.

ANTONIO J. MORRISON, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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Respondents do not dispute that violence against women is an immense national problem to which the States have failed adequately to respond. Nor do they dispute that violence against women takes a substantial toll on the national economy and interstate commerce, such as by preventing women from obtaining and retaining jobs, traveling, and engaging in all manner of economic activity. They also acknowledge that Congress's findings on those matters are entitled to considerable deference.

Yet, respondents insist that Congress is powerless to provide victims of gender-motivated violence a civil damages remedy against their assailants, notwithstanding that the remedy is narrowly tailored to vindicate victims' civil rights, does not target state officials or intrude into state functions, and does not expand or contract whatever tort remedies may be available to victims under state law. Indeed, respondents suggest that the very narrowness and unobtrusiveness of the remedy undermine its constitutionality, ignoring the well-established rule that Congress may choose to address a problem one step at a time. Respondents are mistaken.

A. Section 13981 Is An Appropriate Exercise Of Congress's Power Under The Commerce Clause

Respondents contend that 42 U.S.C. 13981, the civil remedy provision of the Violence Against Women Act of 1994, exceeds Congress's authority under the Commerce Clause for essentially three reasons: first, because violence against women is not an inherently commercial or economic activity; second, because the nexus between gender-motivated violence and interstate commerce is, in respondents' view, as attenuated as the nexus between gun possession near schools and interstate commerce in *United States* v. *Lopez*, 514 U.S. 549 (1995); and, third, because respondents perceive no limiting principle that would enable the Court to uphold Section 13981 but to strike down other statutes as

exceeding Congress's commerce power. None of those contentions is valid.

This Court has repeatedly declined to impose formalistic tests of what activities may be regulated by Congress under the Commerce Clause. So long as an activity, even if neither commercial nor interstate, substantially affects interstate commerce, the activity is not automatically immune from regulation under the Commerce Clause, as respondents suggest. Such a rule would leave Congress unable to address evils that, although not themselves commercial, pose a significant threat to interstate commerce.

As the majority and concurring opinions in *Lopez* suggest, when Congress has invoked its commerce power to regulate activity that is neither inherently commercial or economic nor connected to a legislative program to regulate or protect a market, the Court may subject the regulation to additional scrutiny to assure that a proper distinction between the national and the purely local spheres of authority is maintained. The Court may thus consider whether the connection between the regulated activity and interstate commerce is unduly attenuated. The concurring opinion suggests that in such instances the Court should also consider whether the regulation intrudes into an area of traditional state concern (and, if so, whether it interferes with state authority in a manner that is excessive given the strength of the national objective). Section 13981, unlike the statute at issue in *Lopez*, satisfies those additional tests.

1. Congress's power to regulate intrastate activities that substantially affect interstate commerce is not confined to the regulation of those activities that are themselves inherently commercial or economic in nature. This Court has never so stated.[1] Indeed, the Court has indicated that

[1] Cf. *Wickard* v. *Filburn*, 317 U.S. 111, 125 (1942) ("[E]ven if appellee's activity be local and *though it may not be regarded as commerce*, it may still, *whatever its nature*, be reached by Congress if it exerts a substantial economic effect on interstate commerce.") (emphases added).

Congress may regulate non-commercial activities as part of a legislative program to regulate or protect a market. See *Lopez*, 514 U.S. at 561.[2] Nor would the restriction proposed by respondents bear any relation to the purpose of the commerce power, given that interstate commerce may be substantially affected, indeed obstructed, by activities that are not themselves commercial.

In *Lopez*, the Court found that the activity regulated by the Gun-Free School Zones Act of 1990 (GFSZA) "has nothing to do with 'commerce' or any sort of economic enterprise," 514 U.S. at 561, but the Court did not treat that finding as dispositive. Instead, the Court proceeded to consider whether that non-commercial activity had the requisite effect on, and nexus to, interstate commerce. *Id.* at 562-568. Justice Kennedy's concurrence, which Justice O'Connor joined, suggests that Congress might exercise its commerce power even in situations where "neither the actors nor their

[2] The lower courts have thus consistently held that Congress may prohibit interference with access to medical facilities in order to protect the market for their services, and may prohibit possession of controlled substances or weapons as part of a comprehensive regulation of the market in those products. See, *e.g.*, *Hoffman* v. *Hunt*, 126 F.3d 575, 582-588 (4th Cir. 1997) (upholding Freedom of Access to Clinic Entrances Act against Commerce Clause challenge), cert. denied, 523 U.S. 1136 (1998); *Terry* v. *Reno*, 101 F.3d 1412, 1418-1420 (D.C. Cir. 1996) (same), cert. denied, 520 U.S. 1264 (1997); see also, *e.g.*, *Proyect* v. *United States*, 101 F.3d 11 (2d Cir. 1996) (per curiam) (upholding statute prohibiting, *inter alia*, possession of controlled substances and manufacture of controlled substances for personal use against Commerce Clause challenge); *United States* v. *Leshuk*, 65 F.3d 1105, 1111-1112 (4th Cir. 1995) (same); see also, *e.g.*, *United States* v. *Franklyn*, 157 F.3d 90, 93-96 (2d Cir.) (upholding statute prohibiting possession of machine guns against Commerce Clause challenge), cert. denied, 525 U.S. 1027 (1998); *United States* v. *Kenney*, 91 F.3d 884 (7th Cir. 1996) (same).

conduct has a commercial character, and neither the purposes nor the design of the statute has an evident commercial nexus," provided that Congress does not thereby "upset[] the federal balance." *Id.* at 580.

Respondents' proposed distinction between commercial and non-commercial activities would disable Congress from using its commerce power to protect commerce. It would preclude Congress from exercising that power to regulate *any* intrastate non-commercial activity, no matter how immediate, direct, and substantial a threat that activity may pose to the national economy and interstate commerce. Cf. *National Organization for Women, Inc.* v. *Scheidler*, 510 U.S. 249, 258 (1994) (recognizing that "[a]n enterprise surely can have a detrimental influence on interstate or foreign commerce without having its own profit-seeking motives"). The Framers could not have intended to leave Congress impotent to protect the Nation against such threats. Few would doubt, for example, that Congress may prohibit private possession of nuclear, biological, or chemical weapons, or tanks, artillery pieces, or hand grenades, although mere possession of those articles may not be "commercial," as the Court used the term in *Lopez*.

To take another example, Congress has long exercised its commerce power to require the adoption and observance of an official standard of time throughout the Nation. See 15 U.S.C. 260 *et seq.*; see also *Allied Theatre Owners, Inc.* v. *Volpe*, 426 F.2d 1002 (7th Cir.), cert. denied, 400 U.S. 941 (1970). The activity of setting a clock or a watch is not inherently commercial. Yet, if Congress could not establish clear and consistent rules governing time, interstate commerce would be significantly burdened.

This Court has learned from experience that "mathematical or rigid formulas" are unworkable in assessing the reach of Congress's authority under the Commerce Clause. *Wickard* v. *Filburn*, 317 U.S. 111, 123 n.24 (1942) (quoted in

Lopez, 514 U.S. at 573 (Kennedy, J., concurring)); see also *Lopez*, 514 U.S. at 567 (recognizing that there cannot be "precise formulations" of the extent of the commerce power). It should reject respondents' invitation to adopt such a formula in this case.

2. Section 13981 satisfies the standard articulated by this Court for determining whether intrastate activity may be regulated under the Commerce Clause, *i.e.*, whether the activity "exerts a substantial economic effect on interstate commerce" that is not unduly attenuated. *Lopez*, 514 U.S. at 556 (quoting *Wickard*, 317 U.S. at 125).

First, Section 13981, in contrast to the GFSZA in *Lopez*, rests on extensive congressional findings explicating the relationship between gender-motivated violence and interstate commerce. See H.R. Conf. Rep. No. 711, 103d Cong., 2d Sess. 385 (1994) (H.R. Conf. Rep.); U.S. Br. 5 (quoting relevant findings). Those findings are supported by a massive legislative record, compiled over four years of hearings, which document the impact of violence against women on the national economy and interstate commerce.[3] No legislative record of any sort was compiled with respect to the GFSZA. The conclusory "findings" in support of that statute were made by a subsequent Congress, and thus were not relied on by the United States in defending the statute or considered by the Court in evaluating it. See *Lopez*, 514 U.S. at 562-563

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[3] As respondents note (Morrison Br. 24), while Congress's findings address the impact on interstate commerce of gender-motivated violence, much of the evidence in the legislative record concerns the impact of rape, domestic abuse, and other violence that primarily affects women, whether or not motivated by gender animus. It was reasonable for Congress to conclude from the record that gender-motivated violence alone is sufficiently widespread to impose a substantial burden on interstate commerce. Congress should not be precluded from focusing on this particularly egregious species of violence against women by the shortage of studies isolating its economic impact.

& n.4. Consequently, unlike in *Lopez*, the Court need not "pile inference upon inference" to attempt to discern a nexus between the regulated activity and interstate commerce. *Id.* at 567. Congress has clearly articulated that nexus; nothing therefore need be inferred by the Court.[4]

Second, unlike the GFSZA, Section 13981 regulates an activity that has a direct, immediate, and substantial relationship to interstate commerce. In *Lopez*, the Court would have had to conclude that the possession of guns in school zones (1) might lead to violent crime, (2) which might affect the learning process, (3) which might produce less-productive citizens some years in the future, (4) which might ultimately impair the national economy. See 514 U.S. at 563-564 (describing the government's argument); *id.* at 565 (describing the dissent's argument). And the Court would have had to assume that the educational system, an independent actor under the authority of the States, would fail to compensate for whatever adverse effects on the learning process might be attributable to gun possession in school zones.

No such attenuated chain of causation is necessary to sustain Section 13981. As Congress found, violence against women has a direct impact on interstate commerce by,

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[4] Respondents observe (Morrison Br. 3) that some parties, including the Department of Justice, expressed concerns about Congress's authority under the Fourteenth Amendment to enact earlier versions of Section 13981. In response to those concerns, Congress undertook an extensive analysis of whether a civil remedy could be justified under the Commerce Clause as well as the Fourteenth Amendment. That analysis produced the findings discussed in the text. Neither of the Department of Justice letters cited by respondents addresses the possibility of a Commerce Clause basis for the statute. Nor do the letters address the findings and the rationale subsequently articulated by Congress to justify the statute under the Fourteenth Amendment—namely, that the statute is an appropriate exercise of Congress's power under Section 5 to remedy pervasive denials of equal protection in state justice systems.

among other things, preventing victims from working in the national economy, deterring victims and potential victims from seeking higher-paying jobs, traveling interstate, and engaging in other economic activity, and imposing higher medical costs on victims, employers, insurers, and governments. See U.S. Br. 23-27.

For example, as the evidence before Congress demonstrated, women do not seek jobs that would require them to work at night, out of a reasonable fear that they will be subjected to violence because they are women. The evidence also demonstrated that women who are, in fact, raped or battered often cannot work, or work productively, for weeks or even months afterward. And 6000 women are raped or battered each day in this country. See U.S. Br. 6-7, 23-24 (describing evidence). There is nothing at all remote or speculative about the connection between this conduct and interstate commerce.

Third, unlike the GFSZA, Section 13981 seeks to remedy not some generalized and randomly distributed impact on commerce, but rather the particularized distortion of commerce that is caused by invidious discrimination against a discrete group. Such distortion causes individuals' economic decisions—such as where to work, where to travel, and where to shop—to be determined by immutable characteristics, such as sex or race, and thereby transforms the character of commerce for an entire sector of the population. See *Katzenbach* v. *McClung*, 379 U.S. 294, 300 (1964); *Heart of Atlanta Motel* v. *United States*, 379 U.S. 241, 253 (1964).

Indeed, Section 13981 can properly be viewed as part of the framework of laws enacted by Congress that serve to remove barriers to women's equal participation in the marketplace and thereby to correct the distortion of interstate commerce caused by sex discrimination. See, *e.g.*, 42 U.S.C. 2000e-2(a) and (b) (prohibiting employment discrimination "because of [an] individual's * * * sex" or "on the basis of

* * * sex"); 42 U.S.C. 2000e(k) (defining "because of sex" and "on the basis of sex" to include "because of or on the basis of pregnancy, childbirth, or related medical conditions"); 29 U.S.C. 206(d) (requiring equal pay for women). See also H.R. Conf. Rep. 385 (recognizing relationship between Section 13981 and Title VII); S. Rep. No. 138, 103d Cong., 1st Sess. 48, 54 (1993) (1993 S. Rep.) (same).

3. Justice Kennedy's concurrence in *Lopez* suggests that, when Congress addresses an intrastate activity that is neither itself economic or commercial in nature nor connected to a congressional program to regulate or protect a market, the Commerce Clause inquiry may not be satisfied merely by the fact that the activity substantially affects interstate commerce. It may also be necessary in such circumstances "at the least [to] inquire whether the exercise of national power seeks to intrude upon an area of traditional state concern." 514 U.S. at 580.[5] That inquiry is satisfied with respect to Section 13981 by three federalism-based considerations: Section 13981 addresses the historically fed-

[5] An inquiry into whether a statute "seeks to intrude upon an area of traditional state concern," *Lopez*, 514 U.S. at 580 (Kennedy, J., concurring), does not, under this Court's jurisprudence in such areas as preemption, equate with an inquiry into whether a statute of general applicability incidentally affects an area of traditional state concern. A general federal prohibition of private possession of weapons of mass destruction, for example, would incidentally affect state parks, state schools, and state office buildings, as well as businesses, residences, and all other property within a State. But that is not the sort of "intrusion" that was at issue in *Lopez*, which involved a statute that prohibited gun possession only in or near schools. See generally *United States* v. *Oregon*, 366 U.S. 643, 648-649 (1961) (federal statute properly directed to an area of legitimate congressional concern was not invalid even though it "pertains to the devolution of property," a subject otherwise controlled by state law); *Kolovrat* v. *Oregon*, 366 U.S. 187, 197-198 (1961) (state law controlling devolution of property must accommodate federal treaty rights); *Hauenstein* v. *Lynham*, 100 U.S. 483, 488-490 (1880) (same).

eral concern of civil rights, it avoids undue encroachment into areas of traditional state authority, and it responds to a documented state failure to address a national problem that poses a substantial threat to interstate commerce.[6]

First, Section 13981 singles out those acts of violence that are "due, at least in part, to an animus based on the victim's gender." 42 U.S.C. 13981(d)(1). It thereby seeks to provide a remedy for a violation of civil rights, an area of historically federal concern, which serves interests distinct from those of state tort law. As the final Senate Judiciary Committee Report on Section 13981 explained, "[w]hile traditional criminal charges and personal injury suits focus on the harm to the individual, a civil rights claim redresses an assault on a commonly shared ideal of equality." 1993 S. Rep. 51; see *Griffin* v. *Breckenridge*, 403 U.S. 88, 101-102 (1971) (recognizing that a requirement that the defendant acted with discriminatory animus distinguishes a civil rights remedy from a general tort remedy).

Second, Section 13981 does not operate against the States, does not displace any state law, and does not implicate the peculiarly "sensitive relation between federal and state criminal jurisdiction." *Lopez*, 514 U.S. at 561 n.3. Section 13981 simply creates a private right of action, which enables

[6] Respondents suggest (Morrison Br. 29) that such considerations cannot help to define the limits of the commerce power because "they have nothing to do with 'commerce among the states.'" Respondents are mistaken. For example, in determining what effects on commerce are sufficiently substantial to justify federal regulation, one consideration has historically been whether the regulation is civil rights legislation that seeks to remove barriers that restrict the participation of a discrete group in commerce. See pp. 7-8, *supra*. Respondent Morrison's suggestion that the commerce power does not admit of federalism-based limitations is further belied by his own acknowledgment of such limitations. See Morrison Br. 29 n.10 (observing that "the commerce power is plenary where it is regulating private conduct and acting properly within that power").

victims of gender-motivated violence to seek damages and other relief against their assailants, as an alternative to whatever remedies may be available to them under state tort law.[7] And Section 13981 expressly bars supplemental federal jurisdiction over state-law claims involving such matters as divorce, alimony, and child custody. 42 U.S.C. 13981(e)(4). The care that Congress exercised in preserving the States' authority over matters of criminal and family law, as well as over general tort law, confirms that Section 13981 was not designed to "upset[] the federal balance to a degree that renders it an unconstitutional assertion of the commerce power." *Lopez*, 514 U.S. at 580 (Kennedy, J., concurring).

Third, Section 13981 was enacted in response to the States' sustained failure to deal effectively with the problem of violence against women—a failure that was thoroughly documented in the evidence before Congress, including a decade of state task force reports on gender bias in state justice systems, and that was acknowledged by the vast majority of state attorneys general. As that evidence demonstrated, despite the existence of state criminal laws and state tort remedies capable of reaching most acts of violence against women, many police, prosecutors, judges,

[7] A cause of action under Section 13981 and a cause of action under state tort law are subject to different substantive, procedural, and evidentiary requirements. Some of the requirements of a Section 13981 action, such as the unavailability of interspousal immunity and the availability of attorneys' fees, may be more favorable to the plaintiff; other requirements, such as the necessity to prove that the conduct at issue constituted a crime of violence and was motivated by gender animus, may be less favorable to the plaintiff. The existence of such differences does not, as respondents assert (Crawford Br. 29-34), cause Section 13981 to "displace" state tort law. Such displacement would occur only if Section 13981 preempted state law or dictated the requirements that must be met in a cause of action under state law. Section 13981 does neither.

and other state actors continued to treat rape, domestic abuse, and similar crimes that primarily affect women less seriously than other violent crimes. See U.S. Br. 7-11, 35-36, 38-42 (describing such evidence).[8] For their part, the States advised Congress that the problem required a national solution, including a federal right of action for victims of gender-motivated violence. See *Crimes of Violence Motivated by Gender: Hearing Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 103d Cong., 1st Sess. 34-36 (1993) (letter of 38 state attorneys general). At least in such extraordinary circumstances, where there is an essentially undisputed record of prolonged state inability to remedy a problem that imposes a substantial burden on interstate commerce, federalism concerns should not require Congress to withhold a remedy while the problem and its consequences persist.

To be sure, the Framers of our Constitution sought to divide the powers of the national government and the state governments, so that each would serve as a check on abuses by the other and thereby protect the rights of the people. But the Framers also sought to create a strong central government, correcting what they perceived to be the

[8] Respondents mistakenly suggest (Morrison Br. 2) that 28 U.S.C. 1445(d), which provides that a Section 13981 action cannot be removed from state court to federal court, casts doubt on Congress's intent "to respond to 'systemic' bias in state courts." In providing for concurrent jurisdiction in federal and state court over Section 13981 actions, see 42 U.S.C. 13981(e)(3), Congress sought to enable victims of gender-motivated violence to choose the more appropriate forum, which in some cases might be a convenient state courthouse rather than a distant federal courthouse. Congress sought in 28 U.S.C. 1445(d) to prevent defendants from nullifying that choice of forum. Congress did not, of course, find that all, or even most, state judges or other state actors do not deal fairly with rape, domestic abuse, and other crimes of violence that primarily affect women. Nor need Congress have made such a finding in order for Section 13981 to be sustained.

weakness of the central government under the Articles of Confederation, including its inability to address national concerns. See generally *New York* v. *United States*, 505 U.S. 144, 163 (1992); *FERC* v. *Mississippi*, 456 U.S. 742, 791 (1982) (O'Connor, J., concurring and dissenting); *Wesberry* v. *Sanders*, 376 U.S. 1, 9-10 (1964). It is consistent with the Framers' intent to construe the commerce power in a manner that does not leave the national government powerless to deal with a substantial threat to interstate commerce (and to the rights of a significant segment of the population) that the States have been unable to deal with on their own.[9]

B. Section 13981 Is An Appropriate Exercise Of Congress's Power Under The Enforcement Clause Of The Fourteenth Amendment

We have explained (U.S. Br. 36-49) that Section 13981 may also be upheld as an exercise of Congress's "power to enforce, by appropriate legislation, the provisions of" the Fourteenth Amendment, including its guarantee of equal protection of the laws. U.S. Const. Amend. XIV, § 5. Section 13981 serves to "enforce" women's right to equal protection of the laws against crimes of violence—a right that Congress found had often been denied women in state justice systems as a result of the prejudices of police officers, prosecutors, judges, and other state actors.

Respondents counter that Section 13981 is not a permissible exercise of Congress's power under Section 5 of the Fourteenth Amendment for four reasons: first, because Section 13981 does not, in respondents' view, "enforce" equal protection rights; second, because Section 13981, like the statutes in *United States* v. *Harris*, 106 U.S. 629 (1883), and the *Civil Rights Cases*, 109 U.S. 3 (1883), provides a right of

[9] Of course, overlapping exercise of regulatory authority is consistent with our system of federalism, as shown by such familiar examples as the coexistence of federal and state antitrust laws.

action against private individuals; third, because Section 13981 is not, according to respondents, "congruent and proportional" to the constitutional violations that Congress identified; and fourth, because Section 13981 could not be upheld without granting Congress an unlimited general police power. Respondents are again mistaken on all counts.

1. Respondents contend (Morrison Br. 36) that Section 13981 "does not 'enforce' any citizen's right to equal treatment" because Section 13981 does not directly "prohibit or deter states or state officials from doing anything." This Court has not viewed Congress's enforcement power under Section 5 so restrictively. To the contrary, the Court has recognized that Congress has broad discretion under Section 5 to adopt "[w]hatever legislation is appropriate, that is, adapted to carry out the objects the amendments have in view." *City of Boerne* v. *Flores*, 521 U.S. 507, 517 (1997) (quoting *Ex parte Virginia*, 100 U.S. 339, 345-346 (1880)). It is necessary only that the legislation in some manner "deters or remedies constitutional violations." *Id.* at 518.

Section 13981 "deters or remedies," in multiple ways, the equal protection violations that Congress identified, *i.e.*, the failure of state justice systems to treat rape, domestic abuse, and other crimes that primarily affect women as seriously as they do other violent crimes. See 1993 S. Rep. 42, 49. First, Section 13981 provides an alternative to the state justice system in which to obtain vindication and redress. Accordingly, even if a state police officer, a state prosecutor, or a state judge has wrongly disregarded a woman's complaint of gender-motivated violence (*e.g.*, because of what the Senate Judiciary Committee described as "archaic prejudices" that have caused "those within the justice system" to "blame women for the beatings and the rapes they suffer," 1993 S. Rep. 38), the woman still has an opportunity to have her complaint validated by a federal judge and a federal jury through a process that "the survivor, not the State, con-

trols." S. Rep. No. 545, 101st Cong., 2d Sess. 42 (1990) (1990 S. Rep.). Section 13981 thereby prevents the complete denial of equal protection that Congress found would too often occur if a victim could look only to the state justice system for vindication and redress. And, in the event that a victim who was treated unfairly by the state justice system prevails on a Section 13981 claim, state actors may well be persuaded to give more careful consideration to her complaint and the complaints of similar victims.

Congress also intended that Section 13981 would more broadly deter and remedy violations of equal protection in state justice systems by "send[ing] a powerful message that violence due to gender bias affronts an ideal of equality shared by the entire Nation." 1993 S. Rep. 44; see 1990 S. Rep. 41 (Section 13981 "makes a national commitment to condemn crimes motivated by gender"). Congress contemplated that the message would be heard by police, prosecutors, judges, and other state actors, thereby combating the common "misconception that crimes against women are second-class crimes." 1993 S. Rep. 42; see *Violence Against Women—Victims of the System: Hearing Before the Senate Comm. on the Judiciary*, 102d Cong., 1st Sess. 125 (1991) (testimony of chair of Florida Supreme Court Gender Bias Study Implementation Commission that a federal civil remedy such as Section 13981 would "increase the responsiveness of the states").

2. Respondents contend (Morrison Br. 37-39) that Section 13981 is undermined by *Harris* and the *Civil Rights Cases*, which respondents construe as "reject[ing] Section 5 of the Fourteenth Amendment as a basis for reaching private conduct." As we previously explained (U.S. Br. 46-48), the Court's holdings in those cases are more limited—*i.e.*, that Congress cannot legislate under Section 5 on the theory that the Equal Protection Clause may be violated by purely private conduct unconnected to state action. Such an

understanding is confirmed by the Court's explanation in the *Civil Rights Cases* that the statute at issue—which established a right to be free of private discrimination in places of public accommodation—did "not profess to be corrective of any constitutional wrong committed by the States." 109 U.S. at 14; see *ibid.* (noting that the statute established "rules for the conduct of individuals in society towards each other, * * * without referring in any manner to any supposed action of the State or its authorities"); see also *Harris*, 106 U.S. at 640 ("the section of the law under consideration is directed exclusively against the action of private persons, without reference to the laws of the State or their administration by her officers").[10]

Section 13981, in contrast, *does* "profess to be corrective of [a] constitutional wrong committed by the States," a denial of equal protection in state justice systems to victims of gender-motivated violence. As the Conference Report explains, Section 13981 was designed to remedy "existing bias and discrimination in the criminal justice system," which "often deprive[] victims of crimes of violence motivated by gender of equal protection of the laws and the redress to which they are entitled." H.R. Conf. Rep. 385; see also 1993 S. Rep. 55 (explaining that Section 13981 was designed to "rectify the biases" of state law and practice, which were depriving women of the "equal protection of the laws * * * in the classic sense"). It is not inconsistent with the holdings of *Harris* and the *Civil Rights Cases*—much less with the text of the Fourteenth Amendment—to permit Congress to

[10] It is irrelevant that, as respondents note (Morrison Br. 37-39), some members of Congress observed during the debates on the statutes in *Harris* and the *Civil Rights Cases* that some States were not enforcing their own laws evenhandedly. That does not mean that those statutes were designed, in the view of either Congress or the Court, to deter or remedy constitutional violations by the States. No such design is evident in the text of those statutes.

reach private conduct as a means of preventing and remedying state violations of equal protection.

3. Respondents further argue (Morrison Br. 43) that Section 13981 is not a "congruent and proportional" remedy for either of two reasons: first, that the legislative record does not, in respondents' view, contain evidence of widespread violations of equal protection (*id.* at 44-47) and, second, that Section 13981 may not apply in some situations in which equal protection violations have occurred and may apply in some situations in which equal protection violations have not occurred (*id.* at 47-48).

a. Respondents are simply wrong in suggesting (Morrison Br. 44-45) that the legislative record contains only isolated or "anecdotal" evidence of state violations of equal protection. Respondents ignore the more than 20 state task force reports, cited repeatedly in the congressional committee reports on Section 13981, that exhaustively investigated gender bias in state justice systems.[11] Those reports consistently found that violent crimes that primarily affect women, such as rape and domestic abuse, are treated less seriously by state justice systems than are other violent crimes. And the reports attributed that disparity, in significant part, to the "prejudices," "biases," and "stereotypes" harbored by police, prosecutors, judges, and other state actors. See S. Rep. No. 197, 102d Cong., 1st Sess. 43-44 (1991) (1991 S. Rep.); see also U.S. Br. 7-11, 38-41 & nn.20, 21

[11] The state task forces were composed of "appellate and trial judges, lawyers, bar leaders, law professors, court administrators judicial educators, legislators, community leaders, and social scientists." Lynn H. Schafran, *Overwhelming Evidence: Reports on Gender Bias in the Courts*, Trial 28 (Feb. 1990) (cited in S. Rep. No. 197, 102d Cong., 1st Sess. 43-44 (1991)). The task forces "employ[ed] a wide range of data-collection methods," including public hearings, interviews with judges, lawyers, and litigants, reviews of transcripts and written decisions, empirical studies, and surveys of judges, lawyers, and court personnel. *Ibid.*

(citing evidence of bias from state task force reports and other materials before Congress); Brzonkala Br. 13-17; Amici Br. of Law Professors 18-23. Respondents do not, and cannot, dispute that purposeful state action that disadvantages a particular group because of such inaccurate stereotypes violates the Equal Protection Clause. See, *e.g.*, *United States* v. *Virginia*, 518 U.S. 515, 532-534 (1996); *City of Cleburne* v. *Cleburne Living Ctr.*, 473 U.S. 432, 450 (1985).[12]

Respondents fail to recognize, moreover, the "wide latitude" that is accorded Congress in identifying conduct that may violate equal protection. *Flores*, 521 U.S. at 520, 535. Congress is not required to observe the same constraints as would a court with respect to, for example, evidentiary rules, burdens of proof, and the need to base its conclusions solely on the record of the case before it. See *Fullilove* v. *Klutznick*, 448 U.S. 448, 502-503 (1980) (Powell, J., concurring) (Congress, unlike the courts, "has no responsibility to confine its vision to the facts and evidence adduced by particular parties," but may "consider all facts and opinions that may be relevant to the resolution of an issue"). Congress is thus not restricted to addressing particular conduct that the courts have already determined to be constitutionally discriminatory.[13]

[12] As respondents note (Morrison Br. 45), some victims of gender-motivated violence are men, although Congress assumed that the number was relatively small. But that fact does not undermine the conclusion that women have often been denied equal protection of the laws in state justice systems and that Section 13981 is an appropriate remedy for those violations.

[13] As we noted (U.S. Br. 41), however, several federal courts had recognized by the time that Section 13981 was enacted that state actors' failure to treat domestic violence as seriously as other violence may constitute an equal protection violation. Respondents erroneously claim (Morrison Br. 46) that "[n]ot one of these cases found a sex-discriminatory policy after trial." In fact, after the decision denying the municipality's

In sum, the legislative record in this case amply establishes the existence of widespread violations of equal protection in state justice systems. This case thus stands in stark contrast to the cases on which respondents rely, *Flores* and *Florida Prepaid Postsecondary Education Expense Board* v. *College Savings Bank*, 119 S. Ct. 2199 (1999), where the legislative record revealed no pattern of constitutional violations.

b. Respondents also complain (Morrison Br. 47-48) that Section 13981 is overinclusive, underinclusive, or both. But this Court has never required a precise fit between the constitutional violations identified by Congress and the remedy provided by Congress under Section 5 of the Fourteenth Amendment.

As for respondents' contention that Section 13981 is not limited to States in which equal protection violations have occurred (Morrison Br. 47), this Court has recognized that "[l]egislation which deters or remedies constitutional violations can fall within the sweep of Congress' enforcement power even if in the process it prohibits conduct which is not itself unconstitutional." *Flores*, 521 U.S. at 518; accord, *e.g.*, *Katzenbach* v. *Morgan*, 384 U.S. 641, 651 (1966); *South Carolina* v. *Katzenbach*, 383 U.S. 301, 308 (1966). Moreover, given the evidence before Congress documenting the disparate treatment of crimes primarily affecting women in virtually every State that had studied the subject, Congress could reasonably conclude that the threat of equal protection violations existed throughout the Nation. See 1991 S. Rep. 43 (noting that "[s]tudy after study commissioned by the highest courts of the States—from Florida to New York, California to New Jersey, Nevada to Minnesota—has concluded that crimes disproportionately affecting women are often treated less seriously than comparable crimes against men").

motion to dismiss in one of those cases, *Thurman* v. *City of Torrington*, 595 F. Supp. 1521 (D. Conn. 1984), the jury found an equal protection violation and awarded damages of $2.3 million, and the plaintiff then agreed to settle the case for $1.9 million. See *Millions Awarded . . . uten Wife Who Sued Connecticut Police*, Washington Post (June 26, 1985); see also *Batterers Win Another Round*, Boston Globe (May 13, 1998). Congress was well aware of the landmark *Thurman* case, as the plaintiff testified in support of the Violence Against Women Act. *Women and Violence: Hearings Before the Senate Comm. on the Judiciary*, 101st Cong., 2d Sess. 99 (1990) (testimony of Tracy Motuzick (formerly Thurman)); see *id.* at 88 (discussion of *Thurman* case by Chairman Biden).

As for respondents' complaint that Section 13981 does not reach all situations in which equal protection violations might occur, this Court has recognized that Congress is entitled to deal with a problem one step at a time. See *FCC* v. *Beach Communications, Inc.*, 508 U.S. 307, 316 (1993) (Congress "must be allowed leeway to approach a perceived problem incrementally."). And other provisions of the Violence Against Women Act, such as those that provide funds to educate state police, prosecutors, and judges on issues relating to rape and domestic violence, also respond to the equal protection violations that Congress identified. See 42 U.S.C. 3796gg(b)(1), 3796hh(b)(6).

c. As we have explained (U.S. Br. 49-50 & n.29), Section 13981, unlike the statutes invalidated in *Flores* and *Florida Prepaid*, is congruent and proportional to the constitutional violations that Congress identified. It does not seek to redefine the substantive prohibitions of the Fourteenth Amendment. It instead is designed to respond to an extensively documented record of constitutional violations, as defined under existing law, that Congress found to be frequent, ongoing, and widespread. It does so by providing a private civil remedy to victims of the very sorts of crimes that Congress found were treated in a discriminatory manner in state justice systems. And it does not operate against the State, interfere with state functions, or rewrite state law.

4. Finally, contrary to respondents' assertions (Morrison Br. 48), the Court would not be "grant[ing] Congress an unlimited general police power" by sustaining Section 13981 as an appropriate exercise of Congress's authority under Section 5 of the Fourteenth Amendment. As discussed above and in our opening brief (at 7-11, 38-41 & nn. 20, 21), Congress adopted Section 13981 only after compiling an extensive record of pervasive denials of equal protection in state justice systems—denials that were limited to crimes of rape, domestic abuse, and other violence that primarily affect women. There is no reason to believe that Congress could compile a similar record with respect to crimes generally.

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For the foregoing reasons and those stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General

DECEMBER 1999

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